

NOV 27 2006

U.S. BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**

In re: ) Chapter 11  
THE VILLAS AT HACIENDA )  
DEL SOL, INC., ) Case No. 4-05-bk-1482-EWH  
Debtor. )  
**MEMORANDUM DECISION**

**INTRODUCTION**

The Villas at Hacienda Del Sol, Inc. ("Villas" or "Debtor") filed a Chapter 11 bankruptcy petition on March 28, 2005. Louis Cohen ("Cohen") asserts a claim for \$1.25 million against the Debtor, based upon a promissory note ("Note") in that amount issued in his favor by the Debtor. Equity shareholders, David Mason and Manchester Development Company (collectively, "Mason"), object to Cohen's claim. Mason asserts that Cohen is not a Holder in Due Course ("HIDC") under Uniform Commercial Code ("UCC") §3-302<sup>1</sup> because he took the Note with notice of a claim for breach of fiduciary duty.

On October 19, 2006, the Court held an evidentiary hearing on the objection filed by Mason. The parties agreed that the hearing was limited to the question of whether Cohen is a HIDC of the Note.

---

<sup>1</sup> Hereafter, all citations to the UCC will be referenced by section only.

1 Because the evidence demonstrates that Cohen is a HIDC and that he  
2 took the Note without any notice of a breach in fiduciary duty,<sup>2</sup>  
3 Mason's objection is overruled.

4 **FACTS**

5 Cohen invested money in a project known as Country Village Road.  
6 Albert Gersten ("Gersten") and Martin Collier ("Collier") were  
7 involved in this project. Cohen had invested or been involved with  
8 other projects of Gersten and Collier, having known both men for  
9 many years. Country Village Road was going to be sold. Cohen  
10 wished to invest his proceeds from that project, up to \$1.25  
11 million, in another Collier and Gersten project -- the Debtor.

12 Gersten and Collier have a company called GC Enterprises. Before  
13 the closing of the sale of Country Village Road, GC Enterprises  
14 agreed to advance funds to the Debtor on Cohen's behalf. The  
15 parties understood that upon the closing of Country Village Road,  
16 the amount advanced would be reimbursed to GC Enterprises and a Note  
17 would be issued from the Debtor for the amount advanced. The  
18 agreement between Cohen and GC Enterprises was memorialized in a  
19 letter dated May 1, 2003, and signed by Cohen and Collier. (Cohen  
20 Exhibit C-2.)

21 Country Village Road sold, and the Debtor issued a Note to Cohen  
22 in the amount of \$1.25 million, dated November 18, 2004. (Cohen  
23 Exhibit C-1-A.) The Note was signed by Collier as President of the  
24

25 \_\_\_\_\_  
26 <sup>2</sup> For purposes of this ruling, the Court does not decide  
whether there was, in fact, a breach of any kind.

1 Debtor. When the Debtor filed for bankruptcy, it scheduled Cohen's  
2 claim as undisputed.

3 ISSUE

4 Is Cohen a Holder in Due Course?

5 STATEMENT OF JURISDICTION

6 The Court has jurisdiction over this matter pursuant to 28 U.S.C.  
7 §1334 and General Order 128 of the United States District Court for  
8 the District of Arizona. Venue is proper under 28 U.S.C. §1409.

9 DISCUSSION

10 Mason alleges that Collier breached his fiduciary duty by issuing  
11 the Note from the Debtor to satisfy a debt owed to Cohen by GC  
12 Enterprises. Mason further alleges that Cohen took the Note with  
13 notice of the breach of fiduciary duty, which thereby prevents him  
14 from being a HIDC.

15 STATUTORY BACKGROUND

16 This issue involves several sections of the UCC. Under §3-306, a  
17 person taking an instrument is subject to a claim to the instrument  
18 or its proceeds, unless the person is a HIDC under §3-302. Under  
19 §3-302(a)(2)(v), the taker cannot be a HIDC if the instrument was  
20 taken with notice of a claim under §3-306.

21 A claim under §3-306 includes a claim of a "represented person"  
22 under §3-307(b)(iii) (the represented person makes a claim to the  
23 instrument or its proceeds on the basis that the transaction of the  
24 fiduciary is a breach of fiduciary duty). Section 3-307 specifies  
25 rules for determining when a person taking an instrument has notice  
26

1 of the claim, which will prevent assertion of his rights as a HIDC  
2 because of §3-302(a)(2)(v).

3 Section §3-307 provides in pertinent part:

4 (a) In this section:

5 (1) "Fiduciary" means an agent, trustee, partner, corporate  
6 officer or director, or other representative owing a  
fiduciary duty with respect to an instrument.

7 (2) "Represented person" means the principal, beneficiary,  
8 partnership, corporation, or other person to whom the duty  
stated in paragraph (1) is owed.

9 (b) If (I) an instrument is taken from a fiduciary for  
payment or collection or for value, (ii) the taker has  
10 knowledge of the fiduciary status of the fiduciary, and  
(iii) the represented person makes a claim to the instrument  
11 or its proceeds on the basis that the transaction of the  
fiduciary is a breach of fiduciary duty, the following rules  
apply:

12 (1) Notice of breach of fiduciary duty by the fiduciary is  
notice of the claim of the represented person. . . .

13 (4) If an instrument is issued by the represented person or  
14 the fiduciary as such, to the taker as payee, the taker has  
notice of the breach of fiduciary duty if the instrument is  
15 (I) taken in payment of or as security for a debt known by  
the taker to be the personal debt of the fiduciary, (ii)  
16 taken in a transaction known by the taker to be for the  
personal benefit of the fiduciary, or . . . .

17 MASON'S OBJECTION

18 Mason asserts that Cohen had notice of a breach of fiduciary duty  
19 for purposes of §3-307, which prevents him from being a HIDC. Mason  
20 argues that Cohen knew that Collier was the Debtor's President and  
21 that the transaction was for the personal benefit of Collier.

22 Mason's argument makes two assumptions. First, it assumes that  
23 Mason satisfies §3-307(b)(iii) as the represented person making a  
24 claim. However, Mason may not qualify as "the represented person"  
25 under §3-307, which is defined as the principal, beneficiary,  
26 partnership, corporation, or other person to whom the fiduciary duty

1 with respect to the instrument is owed -- this would be the Villas.  
2 It is worth noting that, at the Hearing, Mason's counsel stated that  
3 "Villas is the representative person." (Hearing Transcript at 110,  
4 11. 24-25.) The Debtor, however, is not making a claim to the  
5 instrument based on a breach of fiduciary duty, having scheduled the  
6 debt as undisputed.

7 Second, Mason's argument assumes monies advanced by GC  
8 Enterprises on behalf of Cohen constitute a "personal debt" of  
9 Collier or that the repayment of the advance is for the "personal  
10 benefit" of Collier. There has been no showing that Collier and GC  
11 Enterprises are legally fungible.

12 For purposes of this ruling, however, the Court will decide the  
13 issue without challenging these assumptions. The Court finds that  
14 Cohen is a HIDC because he did not take the Note in a transaction  
15 known by him to be for the personal benefit of Collier. The  
16 evidence demonstrates that Cohen believed his loan was for the  
17 benefit of the Villas, pursuant to his agreement with GC  
18 Enterprises.

19 Mason's argument ignores the fact that, pursuant to the agreement  
20 memorialized in the letter dated May 1, 2003, Cohen understood that  
21 GC Enterprises had advanced the proceeds from the sale of Country  
22 Village Road to the Villas on behalf of Cohen -- it was a two-step  
23 transaction.<sup>3</sup>

24

25

26

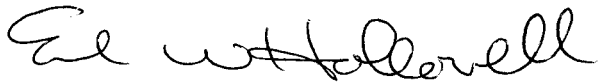
---

<sup>3</sup> At the hearing, Counsel for Mason conceded that the personal benefit element argument would be eliminated if the loan had been accomplished in one step. (Hearing Transcript at 121 l. 25; 122, 11. 1-8.)

CONCLUSION

Because Cohen has demonstrated that he is a HIDC under §3-302 and that his status is not defeated by §3-307 because he took the Note without any notice of a breach in fiduciary duty, he is entitled to have his claim paid. A separate Order will be entered overruling the objection and allowing his claim.

Dated this 27th day of November, 2006.



EILEEN W. HOLLOWELL  
UNITED STATES BANKRUPTCY JUDGE

Copies of the foregoing  
mailed this 27th day of  
November, 2006, to:


Matthew R.W. Waterman  
Waterman & Waterman, P.C.  
33 North Stone Ave. #2020  
Tucson,, Az 85701-1415  
Attorneys for Debtor

Nancy J. March  
DeConcini McDonald Yetwin & Lacy, P.C.  
2525 East Broadway Blvd. #200  
Tucson, AZ 85716-5300  
Attorneys for Louis S. Cohen

John A. Baade  
325 West Franklin St. #123  
Tucson, AZ 85701  
Attorney for Manchester Development and David Mason

Walter F. Wood  
Walter F. Wood Ltd.  
110 South Church Ave. #4398  
Tucson, AZ 85701  
Attorney for Manchester Development and David Mason

1 Martin D. Collier  
2 Albert H. Gersten II  
3 GC Enterprises  
4 15760 Ventura Blvd., Suite 878  
5 Encino, CA 91436

6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
By  \_\_\_\_\_  
Judicial Assistant